

1 THE HONORABLE JOHN C. COUGHENOUR
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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

11 IN RE VALVE ANTITRUST LITIGATION

12 Case No. 2:21-cv-00563-JCC

13 **MOTION FOR LEAVE TO FILE
CONSOLIDATED SECOND AMENDED
CLASS ACTION COMPLAINT**

14
15 **NOTE ON MOTION CALENDAR:
MARCH 17, 2023**

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I. INTRODUCTION

2 Plaintiffs Wolfire Games, LLC (“Wolfire”), Dark Catt Studios Holdings, Inc., and Dark
3 Catt Studios Interactive LLC (collectively with Dark Catt Studios Holdings, Inc., “Dark Catt,” and
4 with Wolfire, “Plaintiffs”) respectfully move the Court for leave to file a Consolidated Second
5 Amended Class Action Complaint (“CSAC”), pursuant to Local Civil Rule 15 and Federal Rule
6 of Civil Procedure 15(a)(2). The CSAC amends the Consolidated Amended Class Action
7 Complaint (“CAC”) filed on August 26, 2022. ECF No. 99.¹ Plaintiffs’ proposed amendment
8 clarifies and corrects a few factual allegations and revises the class definition. Plaintiffs bring this
9 motion in compliance with the parties’ stipulated March 1, 2023 deadline to amend the complaint.
10 ECF No. 97 (Order granting stipulated motion). Prior to filing, Plaintiffs provided the proposed
11 amendment to Valve for review; Valve suggested Plaintiffs file the instant motion while Valve
12 continues to review the proposed amendment.

Leave to amend should be freely granted when justice so requires, and it does here. Plaintiffs' proposed amendment to revise the class definition and make minor changes to factual allegations—for example, standardizing terminology used throughout—will not prejudice Defendant Valve Corporation (“Valve”). With plenty of time left in fact discovery and Valve’s agreement to the March 1, 2023 cut-off for amendment, Valve will not be “unfairly disadvantaged” or deprived of the “opportunity to present facts or evidence” by the amendment. Nor will there be a substantial delay to these proceedings as the case is mid-discovery, and the amendment does not add new claims, legal theories, or parties. Plaintiffs bring this motion in good faith and in a timely manner.

II. PROCEDURAL BACKGROUND

²³ Wolfire filed its original complaint on April 27, 2021. ECF No. 1.² On May 4, 2021,

²⁵ ¹ A redline comparing the Consolidated Amended Class Action Complaint and the proposed CSAC is attached as Exhibit 1.

² All docket references are to *Wolfire Games, LLC v. Valve Corp.*, now captioned *In re Valve Antitrust Litigation*, No. 2:21-cv-00563-JCC, unless otherwise noted.

1 Wolfire notified the Court of the related matter pending in another jurisdiction captioned *Colvin*
 2 *v. Valve Corp.*, No. 2:21-cv-00801 (C.D. Cal.). ECF No. 24. The *Colvin* action was transferred
 3 to this District and on May 19, 2021, Wolfire, the *Colvin* plaintiffs, and Valve filed a stipulated
 4 motion to consolidate the *Wolfire* action and *Colvin* action, which the Court granted. ECF Nos.
 5 28, 29. Wolfire filed a consolidated amended complaint, ECF No. 34, and Valve moved to compel
 6 arbitration of the consumer claims and stay the *Wolfire* claims. ECF No. 35. Valve subsequently
 7 moved to dismiss Wolfire's claims. ECF No. 37.

8 On November 25, 2021, the Court granted Valve's motion to compel arbitration as to the
 9 consumer claims and stayed those claims, but did not stay Wolfire's claim. ECF No. 66. On
 10 November 19, 2021, the Court granted in part and denied in part Valve's motion to dismiss
 11 Wolfire's consolidated amended complaint, and granted leave for Wolfire to amend. ECF No. 67.
 12 Pursuant to that Order, on December 20, 2021, Wolfire filed its Second Amended Consolidated
 13 Class Action Complaint. ECF No. 68. Valve filed another motion to dismiss, which the Court
 14 granted in part and denied in part. ECF No. 80. The Court denied Valve's motion as to certain
 15 counts, while dismissing the others. *Id.* at 8. Valve answered the Second Amended Consolidated
 16 Class Action Complaint on June 10, 2022. ECF No. 85.

17 Dark Catt filed its original complaint on June 28, 2021. ECF No. 1, *Dark Catt Studios*
 18 *Holdings, Inc. v. Valve Corp.*, No. 2:21-cv-00872-JCC (W.D. Wash.) ("Dark Catt Action"). On
 19 August 30, 2021, Valve filed a motion to dismiss, which the Court granted in part and denied in
 20 part, with leave to amend, on November 19, 2021. Dark Catt Action ECF No. 56. Dark Catt filed
 21 its Amended Class Action Complaint on December 20, 2021. Dark Catt Action ECF No. 57.
 22 Valve filed a motion to dismiss the amended complaint on January 28, 2022, Dark Catt Action
 23 ECF No. 64, and the Court denied that motion on May 6, 2022. Dark Catt Action ECF No. 70.
 24 Valve answered the amended complaint on June 10, 2022. Dark Catt Action ECF No. 75.

25 On July 22, 2022, Plaintiffs and Valve filed a stipulated motion to consolidate the *Wolfire*
 26 and *Dark Catt* actions as related cases under Local Civil Rule 42, ECF No. 88, which the Court
 27 granted on July 22, 2022. ECF No. 90. Plaintiffs accordingly filed the CAC on behalf of game
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1 publishers in the consolidated case *In re Valve Antitrust Litigation*. ECF No. 99. As stated in the
 2 motion to consolidate, the CAC did not add any substantively new allegations to what was
 3 previously included in the *Wolfire* and *Dark Catt* complaints, nor did it include the claims from
 4 the *Wolfire* complaint that were dismissed with prejudice. ECF No. 88. Valve answered the CAC
 5 on September 23, 2022. ECF No. 104.

6 On August 22, 2022, the Court granted the parties' stipulated motion for the entry of a case
 7 schedule through summary judgment briefing. ECF No. 98. That case schedule set March 1, 2023
 8 as the deadline to amend the complaint; October 31, 2023 as the close of fact discovery; and
 9 December 21, 2023 as the deadline for a motion for class certification. *Id.* at 1.

10 **III. LEGAL STANDARD**

11 Because Plaintiffs bring this motion within the timeframe set out in the Court's scheduling
 12 order (ECF No. 98), the motion is subject to the liberal standard for amendment set out in Federal
 13 Rule of Civil Procedure 15, which states that courts should "freely give leave when justice so
 14 requires." Fed. R. Civ. P. 15(a)(2). The "mandate" in Rule 15(a) "is to be heeded." *Foman v.*
 15 *Davis*, 371 U.S. 178, 182 (1962). That is, the Rule is "to be applied with extreme liberality,"
 16 *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) (citation omitted),
 17 with "all inferences in favor of granting the motion," *Griggs v. Pace Am. Grp., Inc.*, 170 F.3d 877,
 18 880 (9th Cir. 1999). Amendment should be "liberally granted where from the underlying facts or
 19 circumstances, the plaintiff may be able to state a claim." *DCD Programs, Ltd. v. Leighton*, 833
 20 F.2d 183, 186 (9th Cir. 1987) (quoting *McCartin v. Norton*, 674 F.2d 1317, 1321 (9th Cir. 1982)).

21 In determining whether leave should be granted, courts generally consider four factors:
 22 "bad faith, undue delay, prejudice to the opposing party, and futility of amendment." *DCD*
 23 *Programs, Ltd.*, 833 F.2d at 186. The factors are not weighed equally, as prejudice to the opposing
 24 party is the "touchstone of the inquiry." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048,
 25 1052 (9th Cir. 2003). Further, the "party opposing amendment bears the burden of showing
 26 prejudice." *DCD Programs, Ltd.*, 833 F.2d at 187. Without prejudice or a strong showing of the
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1 other factors, “there exists a presumption under Rule 15(a) in favor of granting leave to amend.”

2 *Eminence Capital, LLC*, 316 F.3d at 1052.

3 IV. ARGUMENT

4 Plaintiffs’ proposed amendment will not prejudice Valve, is not brought in bad faith, has
 5 not been unduly delayed, and is not futile. Valve cannot meet its burden of showing prejudice
 6 from the proposed amendment. Accordingly, Plaintiffs’ motion should be granted.

7 A. Plaintiffs’ Proposed Amendment Will Not Prejudice Valve.

8 Undue prejudice to the party opposing amendment “carries the greatest weight” in the
 9 analysis of whether to grant leave to amend, and the party opposing amendment bears the burden
 10 of showing prejudice. *Eminence Capital, LLC*, 316 F.3d at 1052. Prejudice to the nonmoving
 11 party “must be substantial” to support denying leave to amend. *Oppenheimer v. eXp Realty LLC*,
 12 No. 2:21-cv-01304-RAJ-BAT, 2023 U.S. Dist. LEXIS 8015, at *6 (W.D. Wash. Jan. 17, 2023).
 13 The non-moving party “must show that it was unfairly disadvantaged or deprived of the
 14 opportunity to present facts or evidence which it would have offered had the . . . amendments been
 15 timely.” *Wizards of the Coast LLC v. Cryptozoic Entm’t LLC*, 309 F.R.D. 645, 652 (W.D. Wash.
 16 2015) (quoting *Bechtel v. Robinson*, 886 F.2d 644, 652 (3d Cir. 1989)); *see also Oppenheimer*,
 17 2023 U.S. Dist. LEXIS 8015, at *6.

18 The undue prejudice factor usually focuses on whether the amendment will substantially
 19 delay proceedings, such as by necessitating reopening discovery. *See Lockheed Martin Corp. v.*
Network Solutions, Inc., 194 F.3d 980, 986 (9th Cir. 1999) (finding prejudice where the
 20 amendment would require reopening discovery). The mere need for additional discovery because
 21 of an amendment, however, is not sufficient to deny leave to amend. *See Wizards of the Coast*
LLC, 309 F.R.D. at 652 (“[D]elay alone is not sufficient to establish prejudice, nor is a need for
 22 additional discovery.”); *Fosmire v. Progressive Max Ins. Co.*, No. C10-5291JLR, 2011 U.S. Dist.
 23 LEXIS 110077, at *8-10 (W.D. Wash. Sep. 26, 2011) (granting motion to amend to add three new
 24 defendants, finding that “the additional discovery . . . is not exceptionally onerous and will not
 25 result in undue prejudice”).

1 Courts in this District have allowed amendment, including to class definitions, significantly
 2 later than the current status of this case. In *Douglas v. Bank of America, N.A.*, the Court found no
 3 undue prejudice and granted a motion to amend that would “make meaningful changes to the class
 4 definition and class allegations” even though it was filed on the same day as plaintiffs’ class
 5 certification motion, after class discovery had closed. No. C20-0193JLR, 2020 U.S. Dist. LEXIS
 6 217209, at *18 (W.D. Wash. Nov. 19, 2020). Similarly, in *Peoples v. United Servs. Auto. Ass’n*,
 7 the Court granted a motion to amend to add an entirely new class claim after the plaintiff had filed
 8 a class certification motion. No. C18-1173RSL, 2019 U.S. Dist. LEXIS 77295 (W.D. Wash. May
 9 7, 2019).

10 Here, Valve cannot show prejudice from the timing or substance of the proposed
 11 amendment. As to timing, Plaintiffs bring this motion within the time agreed to by Valve for
 12 amendment, while the action is in the middle of fact discovery. The substantial completion
 13 deadline for document productions is two months away and the fact discovery deadline is seven
 14 months away. Moreover, the parties recently stipulated to a one-month extension of an upcoming
 15 discovery deadline, for completion of transactional data productions. ECF No. 121. Depositions
 16 have not yet begun. The class certification motion is not due until December 21, 2023. This
 17 posture is in “stark contrast” to cases in which courts denied leave to amend because the
 18 “amendment was sought either after or on the eve of the close of discovery.” *Dep’t of Fair Emp’t*
 19 & *Hous. v. Law Sch. Admission Council, Inc.*, No. C-12-1830 EMC, 2013 U.S. Dist. LEXIS 16942,
 20 at *18 (N.D. Cal. Feb. 6, 2013).

21 Nor do the proposed amendments materially affect the claims brought or legal theories
 22 underlying them, and are unlikely to significantly alter any party’s discovery strategy or the overall
 23 progression of the case. See *Oppenheimer*, 2023 U.S. Dist. LEXIS 8015, at *8-9 (denying
 24 reconsideration of order granting motion to amend allowing plaintiff to add claims, reasoning the
 25 new claims are “complementary” to the existing claims and “any additional discovery will be
 26 complementary”).

Courts have rejected claims of undue prejudice arising from expansions in class definitions, new class claims, and new allegations requiring significant new discovery. Plaintiffs' proposed amendment is less drastic. It increases the precision of the class definition now that Plaintiffs have a better understanding of, for example, Valve's contracting practices and policies related to Steam and processing of sales made through the Steam store, including the deduction of Valve's 30% commission. Plaintiffs seek to include all persons in the class definition who have suffered a common antitrust injury because of Valve's anticompetitive conduct and seek to adapt the class definition accordingly. This information was obtained through the discovery process and was unavailable at the time of the CAC.

When amendment affects the class definition but does not change the overall claims asserted, factual bases for those claims, or theories in the case, the amendment does not constitute "undue prejudice" to a defendant even though the new definition could "entail some additional discovery." *Dep't of Fair Emp't & Hous.*, 2013 U.S. Dist. LEXIS 16942, at *18; *see also Wright v. Corr. Corp. of Am.*, No. 1:00-CV-00293(GK), 2016 U.S. Dist. LEXIS 6855, at *7-8 (D.D.C. Jan. 21, 2016) ("a mere increase in class size is neither complex nor inherently prejudicial").

Plaintiffs' proposed amendment should be allowed under the liberal standard of Rule 15.

B. The Amendment Is Not Sought in Bad Faith or for a Dilatory Motive.

Plaintiffs bring this motion in good faith to correct inconsistencies in the CAC and refine the class definition. The proposed amendment will not substantially impact the scope or length of this litigation, and Plaintiffs do not seek to add claims or theories of liability.

"In the context of a motion for leave to amend, 'bad faith' means acting with intent to deceive, harass, mislead, delay, or disrupt." *Wizards of the Coast LLC*, 309 F.R.D. at 651. In other words, bad faith "exists when the addition of new legal theories are baseless and presented for the purpose of prolonging the litigation." *Paz v. City of Aberdeen*, No. C13-5104 RJB, 2013 U.S. Dist. LEXIS 169037, at *12 (W.D. Wash. Nov. 25, 2013) (citing *Griggs v. Pace American Group, Inc.*, 170 F.3d 877, 881 (9th Cir. 1999)). Plaintiffs' amendment presents no new legal theories, much less "baseless" ones to prolong this case or "deceive" or "harass" Valve. Plaintiffs

1 have no dilatory motive or intent to “disrupt” the pace of proceedings, either. Instead, Plaintiffs
 2 have the incentive and intent to progress through class certification and summary judgment swiftly,
 3 in the best interests of members of the proposed class.

4 Leave to amend is warranted under this factor.

5 **C. Plaintiffs Have Not Unduly Delayed the Motion for Leave.**

6 Plaintiffs’ motion for leave to amend is timely and will not unduly postpone the
 7 proceedings. The motion is brought within the timeframe for amendments agreed on by the parties
 8 and approved by the Court, with plenty of time remaining in the fact discovery period.

9 While Plaintiffs’ motion is timely, even if it was not, it is well-settled that “delay alone is
 10 not sufficient to justify the denial of a motion requesting leave to amend.” *DCD Programs, Ltd.*,
 11 833 F.2d at 187; *see also United States v. Webb*, 655 F.2d 977, 980 (9th Cir. 1981) (“[D]elay alone
 12 no matter how lengthy is an insufficient ground for denial of leave to amend.”); *Roberts v. Arizona
 Bd. of Regents*, 661 F.2d 796, 798 (9th Cir. 1981) (“Ordinarily, leave to amend pleadings should
 14 be granted regardless of the length of time of delay by the moving party absent a showing of bad
 15 faith by the moving party or prejudice to the opposing party.”). Another factor must be present:
 16 there must also be prejudice to the opposing party, bad faith by the moving party, or a finding of
 17 futility as to the amendment. *See Bowles v. Reade*, 198 F.3d 752, 757-58 (9th Cir. 1999); *Webb*,
 18 655 F.2d at 980. Plaintiffs have not, however, delayed filing this motion since they determined in
 19 good faith that amendment is needed, nor is there support for the other factors.

20 Accordingly, this factor also weighs in favor of granting leave to amend.

21 **D. Plaintiffs’ Amendment Is Not Futile.**

22 The Wolfire and Dark Catt claims that survived motions to dismiss are included in the
 23 CAC, and Valve did not challenge the sufficiency of the pleading as to the CAC. Plaintiffs’
 24 proposed amendments to the CAC do nothing to change the validity and sufficiency of the claims,
 25 but rather make minor changes to a few factual allegations and revise the class definition. In short,
 26 the proposed CSAC contains the same core claims and theories as the CAC. It would not be
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1 subject to dismissal and therefore amendment is not futile. *See Moore v. Kayport Package Exp.,*
 2 *Inc.*, 885 F.2d 531, 538 (9th Cir. 1989).

3 Courts may also consider prior opportunities to amend when determining whether to grant
 4 leave to amend. Wolfire and Dark Catt both previously amended their complaints, prior to
 5 consolidation of the two actions, to respond to deficiencies found by the Court, but the amended
 6 versions survived motions to dismiss. With the exception of the consolidation of the two
 7 complaints, which included no substantive changes, Plaintiffs have not sought leave to amend
 8 since.

9 V. CONCLUSION

10 For the reasons stated above, Plaintiffs respectfully request the Court enter an order
 11 allowing them to file the proposed Consolidated Second Amended Class Action Complaint.

12 Dated: March 1, 2023

13 I certify that this memorandum contains 2,730 words, in compliance with the Local Civil Rules.

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